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Responses to the Ten Questions

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RESPONSES TO THE TEN QUESTIONS

Joshua L. Dratel[†]

1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA? 5007
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1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA?

The question brings to mind the oft-quoted (but perhaps never uttered) remark attributed to President Andrew Jackson after the Supreme Court, in *Worcester v. State of Georgia*,¹ invalidated a Georgia state statute extending state sovereignty to Cherokee tribal lands: “John Marshall has made his decision, now let him enforce it.”² Certainly the President, as we have witnessed in the context of the

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1. 31 U.S. (6 Pet.) 515 (1832).

2. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 759 (rev. ed. 1926).

detention of, among others, Jose Padilla from 2002 to 2006, possesses the physical authority to detain a U.S. citizen under the circumstances described above—and that may be all that is necessary for practical purposes.

By the time the Supreme Court addresses the issue dispositively, the President will have accomplished the objective: the citizen's veritable, indefinite detention without access to any form of independent judicial adjudication of the merits of the detention. Indeed, in *Padilla*, a District Court in the Southern District of New York, and the Second Circuit thereafter, ordered that Mr. Padilla be provided access to counsel.³ Those rulings were ignored until, on the eve of the Supreme Court argument nearly a year later, the Government permitted access to counsel by its grace, and not in compliance with judicial directive.

Similarly, neither the Second Circuit's decision declaring invalid Mr. Padilla's indefinite detention without the right to habeas corpus, and directing that he be afforded an evidentiary hearing,⁴ nor the District of South Carolina's subsequent decision finding Mr. Padilla's detention unconstitutional,⁵ were honored by the executive. Only when the inevitable head-counting relative to the anticipated vote in the Supreme Court indicated the Court, too, would rule in Mr. Padilla's favor, did the President unilaterally abandon the "enemy combatant" detention of Mr. Padilla, and opt instead for a criminal indictment.⁶

The case of Saleh al-Marri followed a nearly identical pattern. Although not a citizen, Mr. al-Marri was subject to the converse of Mr. Padilla's situation: he was initially charged in federal court, then removed and declared an "enemy combatant" and held in military custody, only to be returned to federal court once the Supreme Court agreed to hear his appeal.⁷ Nor did a favorable intermediate decision by a Fourth Circuit panel disturb for even a moment Mr. al-Marri's

3. *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003); *Padilla ex. rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 57 (S.D.N.Y. 2003).

4. *Padilla*, 352 F.3d at 724.

5. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 688 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006); *see also* *Padilla v. Hanft*, 547 U.S. 1062, 1062 (2006) (mem.) (Kennedy, J., joined by Roberts, C.J., and Stevens, J., concurring).

6. *See* *United States v. Padilla*, No. 04-CR-60001, 2006 WL 2415946 (S.D. Fla. Aug. 18, 2006).

7. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *rev'd*, *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *cert. granted*, 129 S.Ct. 680 (2008), *dismissed as moot*, *al-Marri v. Spagone*, 129 S.Ct. 1545 (2009) (mem.).

indefinite detention without charge or process.

Thus, the President's power to act and the judiciary's general inability to enforce its orders—or even resolve the issue when the executive moots it by changing the detainee's designation from “enemy combatant” to criminal defendant—will always trump whatever constitutional principles apply. Before moving on to a more detailed discussion of the practical implications of that authority, for the record I will state my opinion that such detention is unconstitutional. The reasons for such a conclusion are sufficiently set forth in the opinions already cited, as well as in Justice Scalia's dissent from the U.S. Supreme Court's decision in *Hamdi v. Rumsfeld*.⁸

The thornier issue for me is this: what is to stop the President from exercising that detention power in the first place? Knowing that the principal goal—indefinite detention—will be achieved simply by defiance as the case grinds its way through the lower and appellate courts, what incentive is there for the executive to act lawfully and consistently with constitutional rules?

For me, the issue presents a genuine dilemma⁹ that I have not yet resolved, although I careen back and forth without making much progress toward the ultimate decision. Leaving aside the constitutional question, should we consign these special cases and their extremely rare occurrence to “outlier” status, like lightning strikes, and leave the system otherwise undisturbed? Or should we construct a new set of procedures to address them, no matter how infrequently they occur? Would creating a set of rules give the executive pause before acting, or would that new system encourage the power to be used more often? Is it moral, or even advisable, to sacrifice the fundamental rights of a select few in order to avoid the potential diminution of rights for others?

8. 542 U.S. 507, 554 (2004) (Scalia, J., joined by Stevens, J., dissenting) (“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause.”).

9. A “dilemma” presents two choices, neither of which is satisfactory. See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 554 (2d ed. 1987). In contrast, a “Hobson's Choice” (often mistaken for a dilemma) presents, in fact, no choice at all (accepting the mount chosen by Mr. Hobson, the proprietor of the stable, or none at all). See *id.* at 909.

Since the *Padilla* situation arose, I have wrestled with the question, from the perspective of a defense lawyer, whether Mr. Padilla would have benefitted from a set of rules crafted to govern his particular circumstances, i.e., one that enumerated the circumstances under which he could be initially detained, the process to which he was due before that detention could be sustained, what burden the Government would be compelled to satisfy before that detention could continue, and for how long. Or would that merely have provided a convenient imprimatur for what the Constitution might well prohibit under any circumstance?

As a citizen generally, and a lawyer specifically, I have wrestled with a corresponding set of questions: Is it acceptable to have a two-tiered system of justice that eschews rules for a small number? Is that small number sufficient to justify tinkering with a system that has operated satisfactorily for more than 200 years? Or do we want to leave the executive the discretion to use such extraordinary and perhaps *ultra vires* powers sparingly, with wisdom and restraint, rather than inviting a broader, permanent, and more politicized approach to the problem?

It is hard to argue that Mr. Padilla secured any advantage from the lack of any rules. His uncharged detention lasted far longer than the six months proposed in the question above.¹⁰ It lasted four years. Also, he was deprived of contact with his lawyers for nearly two years (and even then only under strict conditions). He suffered solitary confinement, involuntary, aggressive, and coercive interrogation, and he was denied any opportunity to challenge the factual basis for his confinement.

In the course of my continuing internal debate, I have developed certain immutable principles:

(1) The only gap in our current criminal justice system involves those persons who present a genuine, imminent, and verifiable threat of committing some specific, articulable act that will cause either mass casualties or the failure of some vital infrastructural element that implicates a serious safety risk and substantial casualties (i.e., an air traffic control or railway signal system), but for whom the evidence to arrest is insufficient or unavailable (in the latter instance, for example, sufficiently reliable information provided by a foreign

10. I have chosen the term “uncharged detention” over “administrative detention” because the latter is merely a euphemism for the former.

government that refuses to share the primary source material with the United States).

(2) Any type of uncharged detention system could apply only to such persons. Threats posed as a result of past conduct, or prior conduct that cannot be prosecuted for whatever reason, or the person's status in a terrorist organization, would not suffice. Thus, the factual paradigm in the question would not meet those conditions, although I have used that limited and generalized fact pattern as a springboard to discuss the broader issue of what many denominate "preventive detention."¹¹

(3) A set of rules would be optimal, rather than permitting the executive to act *ad hoc*. Indeed, I believe that any President confronting the situation set forth in item (1) above would act regardless whether any legal mechanism for such detention existed. As a result, if the President is committed to acting notwithstanding the absence of rules, or in contravention of existing law or constitutional provisions (as the past has confirmed, whether it be President Bush with Mr. Padilla, or prior Presidents, such as Lincoln and Roosevelt), I would prefer rules that at the very least provide my client access to a lawyer and the courts and a realistic means of challenging his initial detention or its indefinite continuation.

(4) Any such set of rules should be created within and integrated in the already existing criminal justice system. A new, separate "national security court" would inherently possess too many defects, present and potential, policy and pragmatic, that it would be a prescription for unfairness and injustice for those charged, and would represent a fundamental and unwise departure from the public, transparent, and therefore reliable system of criminal justice that enables the public to regard it with confidence and pride.¹²

11. The term is used with much imprecision. For example, while many describe the United Kingdom's system as "preventive detention," British law enforcement officials have correctly protested that it is more accurately termed "*pre-charge detention*," as it lasts only for prescribed periods, is designed to permit law enforcement to collect evidence sufficient to institute criminal charges, and cannot be continued indefinitely. See CLARE FEIKERT, U.S. LIBRARY OF CONG., PRE-CHARGE DETENTION FOR TERRORIST SUSPECTS: UNITED KINGDOM (Oct. 2008), available at <http://www.loc.gov/law/help/uk-pre-charge-detention.php>.

12. The basis for my opposition to any "national security court" and the numerous intractable flaws I foresee in such a system are too lengthy to include here and include objectives both procedural and substantive, policy and pragmatic, legal

Applying these principles, I have considered what components would be essential to a rational system of such uncharged detention that balanced the various considerations—including security, intelligence, and a detainee’s rights—so that none eclipsed the other. However, I do not vouch for its ultimate constitutionality, but merely for its attempt to harmonize the practical with the statutory, and security with fairness.¹³ In that spirit, those elements—a non-exhaustive list at this stage—are as follows:

(a) As noted above, such a detention regime would apply only to those persons who present a genuine, imminent, and verifiable threat of committing some specific, articulable act that will cause either mass casualties or the failure of some system vital infrastructural element that implicates a serious safety risk and substantial casualties (i.e., an air traffic control or railway signal system), but for whom the evidence to arrest is insufficient or unavailable. I am willing to be somewhat flexible in defining “unavailable.” For example, in addition to the situation described in item (1) above, “unavailability” could conceivably involve a human intelligence source who would be in danger if the information were made public through a criminal charge, or whose continued undercover value so outweighed the disclosure as to make the latter a threat to national security. Nevertheless, such determinations would not be made solely by intelligence or military officials, or

and political. I see “national security courts” as a solution in search of a problem because no one has yet articulated the failings of Article III courts to the extent that would require such a dramatic deviation from what we have utilized successfully for more than 200 years. Ultimately, I believe “national security courts” would not enhance U.S. national security, but diminish it.

13. Certainly due process does not proscribe all forms of uncharged detention. State mental hygiene laws permit involuntary commitment without charge. *See, e.g.*, N.Y. MENTAL HYG. LAW § 9.27 (McKinney 2006). Federal immigration law allows seven days of detention without any administrative recourse. *See* 8 U.S.C. § 1226a(a)(5) (2006). The Supreme Court has authorized continued detention of certain sex offenders even after expiration of their prison terms. *See, e.g.*, *Seling v. Young*, 531 U.S. 250, 262 (2001); *Hendricks v. Kansas*, 521 U.S. 346, 371 (1997). And the Court has also approved the denial of bail pursuant to the federal Bail Reform Act of 1984, which for the first time expressly authorized detention without *any* bail (albeit for those already charged with a criminal offense) based solely on the defendant’s continued “danger to the community” if released. *See United States v. Salerno*, 481 U.S. 739, 755 (1987). Surely these are all examples of “preventive detention” in practice if not in name. For purposes of this discussion, I leave aside detention pursuant to the Laws of Armed Conflict, as presumptively those would not apply to a person apprehended in the U.S. in connection with the prospective commission of a criminal act.

even ordinary law enforcement or prosecutorial personnel, but would have to be certified by the Attorney General, and presented to a federal judge *ex parte* for approval.¹⁴ However, if the subject was already under indictment, the avenue of uncharged detention would not be available to the government (thereby preventing repetition of the al-Marri shell game).

(b) As an additional means of ensuring that (a) is not too permeable a standard, the potential offense would have to be a specifically enumerated crime, carefully limited to only those that criminalize the use of weapons of mass destruction, or radiological, biological, or nuclear weapons, or which target the type of systems described in (1). Congress could not expand the list of qualifying offenses except to add offenses not already enacted by the effective date of the new system, and then only by a four-fifths majority vote of *all* legislators (House and Senate), not just those members present for a vote.

(c) The detainee would have the right to counsel from the outset, and if the detainee could not afford counsel, a lawyer would be appointed and paid by the court pursuant to the Criminal Justice Act¹⁵ (that covers indigent defendants).

(d) The Bill of Rights and any relevant criminal rules and statutes would apply to any such detention and the detainee. In particular, the detainee would have the right to remain silent, to counsel prior to (and at any) interrogation, to be free from cruel and unusual punishment, and to be free from unreasonable search and seizure. At certain stages, as set forth below, the right to confront accusers and call witnesses, and to present affirmative evidence, and for the detainee to testify, would apply.

(e) The detainee would be entitled to discovery. Defense counsel with appropriate security clearance would have access to classified materials pursuant to the provisions of the Classified Information Procedures Act,¹⁶ which would govern any classified aspects of the proceedings.

14. It has long been the case that the identity of an undercover officer can be withheld from the defense in an ordinary criminal prosecution if such identifying information is not exculpatory. *See Roviato v. United States*, 353 U.S. 53, 59 (1957).

15. 18 U.S.C. § 3006A (2006).

16. 18 U.S.C. app. §§ 1–16 (2006).

(f) The determination to detain, both initial and subsequent, would be subject to challenge pursuant to the following time frames and escalating burdens imposed upon the Government:

(i) the detainee would have to be produced in court before a judge within the time prescribed by Rule 5 of the Federal Rules of Criminal Procedure (“without unnecessary delay”).¹⁷ At that proceeding, the Government would have to establish probable cause to detain. A judge could conduct an evidentiary hearing, but would not be required to do so. The evidence would not have to be competent, i.e., it could consist of hearsay, and the court could rely on *ex parte* submissions;¹⁸

(ii) after fifteen days, continued detention would require the Government to meet an increased burden of proof: preponderance of the evidence. Again, the question whether to conduct an evidentiary hearing would be within the judge’s discretion;

(iii) after sixty days, the burden of proof would rise to clear and convincing evidence. At that point, an evidentiary hearing, with the right to call and cross-examine witnesses, would be mandatory. The detainee would have the right, but not the obligation, to testify. Such testimony would be immunized pursuant to 18 U.S.C. §§ 6001 to 6005 (providing for “use” immunity), and would enjoy all the attendant protections.¹⁹ The court would not be permitted to rely on *ex parte* submissions (and if the court initially was provided *ex parte* material by the Government, that material would have to be disclosed to cleared defense counsel); and

17. FED. R. CRIM. P. 5.

18. That would not represent a departure from current standards, as under federal law an indictment need not be based on competent evidence. Indeed, current federal grand jury practice often involves a single law enforcement agent relating to a grand jury the contents of the case file, including multiple hearsay, which, if it meets the probable cause threshold, would be sufficient to secure an indictment. In contrast, certain states, such as New York, limit a grand jury presentation to competent evidence. See N.Y. CRIM. PROC. LAW § 190.65(1) (McKinney 2007).

19. See also *Simmons v. United States*, 390 U.S. 377, 394 (1968) (“[W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.”).

(iv) after 120 days, in order to justify continued detention without charge, the Government would have to establish its case beyond a reasonable doubt after an evidentiary hearing subject to the same rules as in item (iii). Hearsay would still be permitted, but only to the extent the evidence conforms with standards governing Rule 807 of the Federal Rules of Evidence that

- (A) the statement is offered as evidence of a material fact;
- (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The Federal Rules of Evidence would apply in all other respects, and the court's determination would have to be reflected in a written opinion.

(g) If the Government prevailed, the detainee would have a right to appeal (and a continuing right to appointed counsel to pursue that appeal). The court of appeals would be required to perform *de novo* review of the district court's legal and factual findings.

(h) The decision to detain would have to be reviewed again by the district court 180 days thereafter, and again be established beyond a reasonable doubt. The determination whether continued detention remains justified would have to be based on *present* dangerousness, and not on the level of dangerousness at the time of the initial detention. All of the previous procedural safeguards, including the appellate rights set forth in (f), would apply to this subsequent 180-day review.

(i) If the Government prevailed in that 180-day review proceeding, it would be entitled to detain for another 180 days, at which point it would be required either to charge the detainee with a criminal offense or to release him.²⁰ At that point, after more than a year of uncharged detention, it is more than reasonable to require the Government either to develop competent evidence sufficient to indict or reveal what competent evidence was too sensitive to disclose at the

20. The United States could also exercise its immigration authority on aliens and deport them after the allowable periods of uncharged detention expired.

time of the initial detention.²¹ Also, a finite time limit on the maximum uncharged detention, which, at more than a year, certainly would not be brief by any definition, is necessary to provide adequate disincentive to the executive to choose that route rather than criminal charges in the first instance.

(j) Any time periods during which the detainee was in custody (prior to uncharged detention) as a result of a material witness warrant pursuant to 18 U.S.C. § 3144 would be credited toward the maximum period of uncharged detention. Conversely, after expiration of the maximum term applicable to uncharged detention, the detainee could not be further confined on the basis of a material witness warrant (either after uncharged detention, or as a result of a material witness warrant alone). This would prevent achieving the same form of detention by other means.

(k) A determination in favor of a detainee, i.e., that uncharged detention was not (or was no longer) warranted, would act as a bar to any future criminal prosecution for the same conduct at issue in the uncharged detention proceeding. Again, conversely, this double jeopardy protection would also apply if uncharged detention were sought after a criminal prosecution (for the same conduct) was completed (either by acquittal, conviction, or some other disposition that activated the Fifth Amendment's Double Jeopardy Clause).

These stringent limitations are purposeful and would be necessary to discourage the resort to uncharged detention except in those exceedingly narrow circumstances that genuinely fit the paradigm. The constraints would ensure that such authority would not be a default or easy path for the Government, but rather a difficult, challenging, and cumbersome process utilized only in unique and authentic emergencies.

I am sure I have forgotten some essentials, but, as noted before, this list is not exhaustive, although I believe it does cover the fundamentals. Also, I recognize it is largely an academic and aspirational exercise. Given the state of Congress, afflicted as it is by what Dahlia Lithwick has cleverly labeled "terrorism-derangement syndrome,"²²

21. Comparatively, the right to detain without charge under the British system so often cited by proponents of uncharged detention expires after twenty-eight days.

22. See Dahlia Lithwick, *Terrorism Derangement Syndrome*, SLATE, Feb. 3, 2010, <http://www.slate.com/id/2243429/>. The "syndrome" afflicts not just Republicans,

the likelihood of any system containing a modicum of due process or other procedural and substantive protections is wholly fanciful. Consequently, secure in my escapist world of agonizing ambivalence, I expect never to be compelled to decide whether a particular framework for uncharged detention meets my criteria, because anything Congress would propose would fall far short.²³ After all, in the wake of the Umar Farouk Abdulmutallab arrest,²⁴ the cries for complete abandonment of the criminal justice system and its rights-oriented approach suggest a far more foreboding solution should Congress act.²⁵ Also, I am fully cognizant that *any* form of uncharged detention is constitutionally unpalatable to many, and that they may be right (and that I may agree with them if I ever resolve my own internal debate).

3. DID THE MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ADVISING THAT THE GENEVA CONVENTIONS DID NOT APPLY TO AL QAEDA AND THE TALIBAN?

4. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY THEIR GUIDANCE TO THE CENTRAL INTELLIGENCE AGENCY ON INTERROGATION STANDARDS?

These two questions can be answered together.²⁶ The easier,

but also Democrats, Independents, and probably Whigs (and certainly Know-Nothings).

23. For example, since the draft of this section was prepared, Senators McCain (R-Ariz.) and Lieberman (I-Conn.) have introduced legislation that would establish a system of indefinite detention that would bypass a variety of Fifth and Sixth Amendment protections, such as the right to remain silent and the right to counsel. See Statement by Senator McCain on the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 (Mar. 4, 2010), available at http://mccain.senate.gov/public/index.cfm?fuseaction=pressoffice.floorstatements&contentrecord_id=2af60f3a-05dc-cdf6-7dc9-6501a995c17c.

24. See Charlie Savage, *Nigerian Man Is Indicted in Attempted Plane Attack*, N.Y. TIMES, Jan. 7, 2010, at A14.

25. See Thomas Catan, *Cheney Attacks Obama on National Security*, WALL ST. J., Feb. 15, 2010, <http://online.wsj.com/article/SB10001424052748704543804575065361936288390.html>; Stephanie Condon, *Sarah Palin: Obama's Terrorism Approach "Fatally Flawed,"* CBSNEWS, Jan. 5, 2010, http://www.cbsnews.com/8301-503544_162-6059606-503544.html.

26. This section was prepared prior to the February 19, 2010, release of the report by the Justice Department's Office of Professional Responsibility entitled "Investigation Into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation

formalistic legal answer is “no” because legal “malpractice,” in addition to constituting “conduct [that falls] below the ordinary and reasonable skill and knowledge commonly possessed by a member of [the] profession[,]” also requires that (1) the attorney be negligent; (2) such attorney’s negligence constitutes the proximate cause of the loss sustained by the client; and (3) the client “suffered actual and ascertainable damages.”²⁷

In this instance, of course, the problem was not “negligence”; indeed, the conduct was conscious and deliberate. Nor are there “actual and ascertainable damages” customarily recognized by the law. Moreover, the “proximate cause” is dubious, as any injury—political or otherwise—was far more likely the result of the policies of the Office of Legal Counsel (OLC), which were merely ratified by legal opinion, but were formulated and implemented by others.

The harder question, of course, is whether the OLC’s conduct fell below “the ordinary and reasonable skill and knowledge commonly possessed by” a lawyer. In that context, while I cannot seem to avoid telegraphing my ethno-religious identity by answering a question with simply another question, here I go again: who is the “client”? If it is the government agency that employs the lawyer, or the agency that seeks legal guidance, is it “malpractice” merely to parrot in a legal opinion precisely what the agency in advance communicated as the desired conclusion? Thus, when directed by the client to “write me an opinion that says I can do ‘X’,” is it malpractice merely to do as commanded?

However, if the client is the United States as a whole, including its people who pay the OLC lawyers’ salaries, and the Constitution, which the OLC lawyers have sworn to uphold, the issue becomes more problematic, not so much when measuring the “ordinary and reasonable skill and knowledge” of a lawyer facing a particular task, but more so when defining the ethical obligations of a government lawyer. Is the principal fidelity to the immediate (agency) boss, to the ultimate boss (the President), or to the symbolic boss (the people and the Constitution)?

As a criminal defense lawyer, I am loathe to create new species of criminal or even civil liability for conduct performed in good faith, but upon which subsequent events and political or economic

Techniques’ on Suspected Terrorists.” However, that report has not altered my ultimate analysis or answer to these two particular questions.

27. I have relied on New York state law for this definition. *See, e.g.*, *Walter D. Peek, Inc. v. Agee*, 652 N.Y.S.2d 359, 360 (App. Div. 1997).

developments cast suspicion. Indeed, one of the problems in today's litigious world is that failure—whether in the mortgage or securities industry, or any other business that is responsible for or even simply identified with serious economic downturn—is never considered an accident. While some scrutiny and investigation are necessary to distinguish the purposeful fraud from mere misfortune (or simple bad judgment),²⁸ it would be a mistake to begin with the assumption that *all* failed enterprises are stained by corrupt intent.

The same is true for the OLC lawyers. I have defended lawyers in much the same predicament—accused of criminality because of the *results* of their advice, without the attendant and necessary criminal knowledge and intent—and err on the side of caution in this instance as well. Nevertheless, it would be a salutary development for government lawyering in general if a state bar disciplinary committee would commence an investigation whether a (and by that I mean any) particular OLC lawyer's conduct conformed with ethical standards. That would help resolve what is now a contentious issue that has yet to be answered conclusively, and which to me implicates questions that are most important because they look forward toward avoiding what are at best mistakes of judgment and at worst unethical behavior, and not backward merely to punish in the clarity of hindsight. What are the ethical obligations of a government lawyer—and to *whom*—when asked to provide a legal opinion designed to support a political policy? And how close to constitutional invalidity must that policy tread before an endorsement of that policy crosses the line from an aggressive interpretation to a contrived license for illegality?

8. DOES AL QAEDA POSE AN EXISTENTIAL THREAT TO THE UNITED STATES?

While the answer should depend primarily on objective considerations, in fact it does not, which makes the answer “yes.” It matters not whether al Qaeda is in fact capable of dealing a fatal blow to the United States, or sustaining a series of blows that cumulatively could prove fatal. Rather, what matters is what is *perceived* by the majority of Americans and reflected through the choices made by those who govern them.

28. Errors of judgment traditionally do not constitute legal malpractice. See *Rosner v. Paley*, 481 N.E.2d 553, 554 (N.Y. 1985); *Bernstein v. Oppenheim & Co., P.C.*, 554 N.Y.S.2d 487, 489 (App. Div. 1990) (“[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt.”).

In that regard, al Qaeda is treated as an authentic existential threat,²⁹ regardless of whether its capacity for harm qualifies on an objective level. For example, the recent controversy over whether the trial of the persons who will be charged with complicity in the 9/11 attacks would be conducted in New York illustrates the point.³⁰ Likely nothing could render New York *more* of a target for terrorists, and conducting the trial elsewhere will not reduce New York's status as a target, if not *the* number one target. Yet the prospect, however remote, of an al Qaeda strike at New York as a result of the trial (and who can state with confidence that if al Qaeda decides to launch some attack related to the trial, it would not be directed at New York anyway?) was enough to create panic as if the entire city would crumble once Khalid Sheikh Mohammed arrived.

Similarly, the criticism of treating Mr. Abdulmutallab as a criminal defendant, and the corresponding call to jettison the criminal justice system entirely in such instances,³¹ speaks of a level of fear and focus appropriate only to the gravest threats. Indeed, the specter of terrorism, particularly al Qaeda-affiliated terrorism, is the overriding determinant of any decision even indirectly related. It swallows law enforcement, intelligence, and security resources at an unprecedented pace. It has the United States engaged in two difficult military actions in Iraq and Afghanistan. Other threats, tangible and imminent, are virtually ignored by the Government, media, and the public, or treated as hype. Only al Qaeda is incapable of constituting hype.

That is because al Qaeda has captured the imagination—the imagination of fear. As random and categorical as the fear of nuclear annihilation a generation ago, the fear of a catastrophic terrorist attack has revealed the vulnerability of the American psyche. And as we have witnessed with respect to financial markets, once the collective psyche is in retreat, reality is drowned in a tidal wave of hysteria and distortion.

In that manner al Qaeda qualifies as an existential threat to the United States because the United States perceives it so, makes decisions as if it were so, and lives in abject fear—exploited by the press, politicians, and the new security-technology establish-

29. For purposes of this discussion, I employ a composite definition gleaned from dictionary.com: “of, relating to, pertaining to, or dealing with existence.” Dictionary.com, <http://dictionary.reference.com/> (last visited Feb. 21, 2010).

30. See, e.g., Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 30, 2010, at A1; Gail Collins, *Another Inconvenient Truth*, N.Y. TIMES, Jan. 30, 2010, at A23.

31. See *supra* notes 23, 25 and accompanying text.

ment/complex that profits from the economic and popular attention devoted to the terrorism threat—of it. Again, Dahlia Lithwick’s “terrorism-derangement syndrome” is an apt name for it.³² Americans are so terrified of al Qaeda that they appear to be convinced that the country is not sufficiently strong or resilient to survive another terrorist incident, whether catastrophic or not. Thus, no principle is too important to sacrifice for just a little more artificial security from al Qaeda.

The analysis above is not intended to suggest that al Qaeda is not a threat, or that, unchecked, it is not capable of inflicting upon the United States and its interests and allies serious damage in human, psychological, economic, and infrastructural terms. Al Qaeda, in its essence, is fully committed and persistent in its ideology and objectives. But the United States has sustained worse casualties in other conflicts than it has from al Qaeda, has faced and defeated more formidable, better organized, and better equipped foes (even simultaneously, as in World War II).

The loss of perspective and proportionality is troublesome in at least two respects. First, elevating al Qaeda to the level of an existential threat, both emboldens al Qaeda, lending it confidence—and suggesting to its recruits—that it indeed can topple the United States, and infuses each decision the United States makes with the type of fear that obscures judgment and encourages imprudence. An example is the outcry, after the Abdulmutallab incident, to substantially increase the number of persons on the “no fly” list. That is the equivalent of seeking to improve the ability to find a needle by building a vastly bigger haystack. Second, the disproportionate concentration of resources and attention devoted to al Qaeda-generated threats, and the corresponding cultivation of fear, at the expense of all other priorities could very well prevent the United States from identifying other serious threats—perhaps more substantial than al Qaeda—in time to counteract them effectively and in time.

32. See Lithwick, *supra* note 22.
